

Carither's Stores, Inc. and Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, AFL-CIO. Case 20-CA-16322

July 27, 1982

DECISION AND ORDER

**BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER**

On April 16, 1982, Administrative Law Judge Russel L. Stevens issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² We adopt the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(1) of the Act based on the arrest of Business Agent John Allen. In so doing, we find it unnecessary to pass on the Administrative Law Judge's finding that Beatrice Purdy signed an arrest form "as an enraged citizen and not as a supervisor of Respondent" in view of his finding, based on credited testimony, that the police officers acted on their own in arresting Allen.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard in Napa, California, on February 17, 1982.¹ The complaint, issued July 30, is based upon a charge filed June 10 by Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, AFL-CIO (Union). The complaint alleges that Carither's Stores,

Inc.² (Respondent), violated Section 8(a)(1) of the National Labor Relations Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record³ and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a California corporation with an office and place of business in Napa, California, has been engaged in business as a retail department store. During the calendar year ending December 31, 1980, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received at its Napa, California, facility products, goods, and materials valued in excess of \$1,500 originating from points outside the State of California.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act. It is further found, based upon the record, that Local 373 of Hotel, Motel & Restaurant Employees & Bartenders Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

Background⁴

From approximately April 1 until approximately August 30, certain of Respondent's employees, represented by Local 373, were engaged in an economic strike against Respondent and engaged in picketing at Respondent's premises in Napa.

On April 16, at approximately 6:10 p.m., an anonymous telephone call was received by Respondent, advising that a bomb had been placed in Respondent's store in Napa. John Massey, Respondent's store manager,⁵ called the Napa police and fire departments to report the bomb threat. The store was evacuated for approximately 1 hour, while police and fire department personnel

² The complaint was amended at the hearing, with leave of the Administrative Law Judge, to change the caption to Carither's Stores, Inc., from Idaho Department Stores Co. d/b/a Carither's.

³ The complaint was amended at the hearing, with leave of the Administrative Law Judge, to make minor corrections.

⁴ This background summary is based upon stipulations of counsel, and upon credited testimony and evidence that is not in dispute.

⁵ Massey's supervisory status is not in dispute. Individuals are referred to herein by their last names.

¹ All dates hereinafter are within 1981, unless stated to be otherwise.

searched the store for a bomb. None was found. A similar incident occurred the following Tuesday (April 21) at approximately 12:30 or 12:40 p.m.⁶

On April 16 two incidents of cars having been scratched in Respondent's parking lot were reported to Massey, one incident involving a customer of Respondent and one incident involving an employee of Respondent.

The city of Napa has a policy whereby any resident may request the Napa Police Department to furnish off-duty police officers to patrol private premises on a temporary basis. It is common practice for such requests to be made for dances, private functions, athletic events, and special occasions. Officers are dispatched by the police department pursuant to such requests, to patrol in uniform and to carry out that duty in customary fashion as regular police officers in the same manner as while those officers are on regular duty. The only difference between such special duty and the police officers' regular duty is that the special duty is performed during the officers' private time. Pay for the special duty is made to officers by the police department in the same fashion as pay for regular duty, but special duty pay amounts are reimbursed to the police department by those requesting such services.

After the bomb threats and car scratching incidents of April 16, Massey became concerned about possible violence, and made arrangements with the Napa City Police Department for special duty police patrols, in accordance with that department's customary procedure described above. Pursuant to that request, officers Rito Garcia and Christopher Gormley were given the Carither's assignment. Both officers were at Respondent's Napa store on April 23 and participated in the incident involved herein.

At times relevant herein, including April 23, John Allen was a business agent of Local 50. Allen participated in the picketing of Respondent's Napa store on one day, April 23, and during the picketing he talked with customers, passers-by, and some of Respondent's employees who crossed the picket line while going into and out of the store. Some customers and employees complained to Massey and other store personnel that they were harassed and verbally abused by Allen, and there were reports that he also harassed and verbally abused passers-by.

At approximately 5:22 p.m. on April 23 Allen was arrested by Garcia and Gormley, handcuffed, and taken to the police station to be booked for disturbing the peace.

The General Counsel contends that Allen was arrested without probable cause, at the instigation of Respondent, and that the arrest was caused by Respondent in order to interfere with Respondent's employees' protected activity.

1. The nature of Allen's activity

Allen contends that his activity was within the bounds of permissible conduct, and was not valid cause for his arrest. Allen testified: He commenced picketing at 2 or 3

p.m. He conversed with employees crossing the picket line, and with customers whom he tried to dissuade from patronizing the store. He went to the front doors of the store approximately six times, but he did not block the ingress or egress of anyone going into or out of the store. He also talked with Garcia, who did not have a police badge on his clothing and who worked inside the store as "store security."⁷ He called Beatrice Purdy, Respondent's floor supervisor and buyer,⁸ a "low-life scab" and "low-life scum." He called employees inside the store "scabs." He does not remember what he called customers. He burped in the faces of various individuals, from 5 or 6 feet away.

Loretta Basalski, one of Respondent's salespeople and a member of Local 373, testified: She picketed on April 23 from 8 a.m. to 5 p.m., and was the picket captain. Allen called some employees scabs on that day, but he did not block any door, or interfere with any person entering or leaving the store, or curse anyone.

Carol Franco, a former employee of Respondent, corroborated Basalski's testimony.

Gail Soldate testified: She was working at the store on April 23, and saw Allen "blocking the door" by standing in front of the handles and preventing people from entering the store. He did that "most of the time." Allen stuck his head through the door "quite a few times" and made "weird noises," such as growling or burping. Allen was "real rude," and intimidated customers. Approximately six people complained to her about Allen's conduct.

Marlene Loseth testified: She is a member of Local 373 and picketed on April 23 from 5 to 9 p.m. She heard Allen call an employee "scab" on two occasions.

Garcia testified: He reported to Respondent's store at approximately 11 a.m. or noon on April 23, and observed Allen's conduct all afternoon. He warned Allen several times for threatening customers and employees and calling them "asshole, scumbags, pukes," and burping loudly in their faces while only inches away. He had to stop three verbal disputes when Allen was involved with "citizens," and Allen's conduct was getting people upset and inciting them to possible violence. The situation was so precarious at times that he had to calm customers and employees down, as well as Allen. Approximately 10 people, citizens and employees, approached Garcia and said, "I want to file a citizen's arrest." Two people told him "they were going to come back with baseball bat and were going to take care of Mr. Allen if I didn't arrest him." Garcia has been a police officer approximately 3 years and has patrolled picket areas in the past. Allen's conduct was "very unusual for a picketer," in that he was obnoxious, disrespectful, loud, boisterous, and immature. Allen frequently stepped in front of customers, and, when they tried to go around him, he

⁷ This piece of testimony is contrary to the record and is given no credence. Both Garcia and Gormley were in police uniform, were on duty as policemen, and were outside the store at all times except during a few brief instances wherein Garcia went into the store.

⁸ Respondent denies the General Counsel's allegation that Purdy was a supervisor within the meaning of the Act. Purdy supervised and directed the work activity of six or seven employees and disciplined and fired employees. The record clearly shows that Purdy was a supervisor, and it is so found.

⁶ A third, and similar, incident occurred after April 23, which is the date involved in this controversy.

moved and again stepped in front of them, and continued those actions all the way to the door. Garcia said he did not have to warn any picketer that day other than Allen, since no one else was doing the things being done by Allen. He said Allen interfered with and harassed passers-by, as well as customers and employees. Allen refused to apologize to anyone, or to change his conduct after being warned.

Gormley testified much in the same manner as Garcia, and stated that he warned Allen twice, in addition to the warnings given by Garcia, because of Allen's improper and dangerous conduct. Several older women in the store complained to Gormley about Allen's conduct. They "... were quite visibly upset by his vocabulary" Allen was antagonizing people, and on one occasion after a man threatened to hit Allen with a baseball bat, Garcia stepped in, calmed the man down, and warned Allen that he could get hurt if he continued to antagonize people. No picketer other than Allen had to be warned.

Purdy testified that Allen swore at her and insulted her at approximately 2:30 p.m., and that several customers complained to her that day (April 23) about the way they had been mistreated and harassed by Allen. Purdy corroborated the other testimony about Allen sticking his head through the door and burping.

Shirley Wilson, one of Respondent's employees, testified that she was with Purdy when Allen swore at them and insulted them.

Discussion

Gormley was an unusually impressive witness and Garcia seemed quite reliable. Their testimony is credited and they were credibly corroborated in much of their testimony by Smith, Purdy, Wilson, and Massey.

Allen, Basalski, Franco, and Loseth gave sketchy and unconvincing accounts of Allen's actions. One of the General Counsel's witnesses, Soldate, gave more support to Respondent than to Allen.

It is found that, throughout his presence on the picket line April 23, Allen was rude, profane, boisterous, and disrespectful of Respondent's customers, employees, and passers-by. It is further found that Allen threatened and intimidated those persons and created dangerous confrontations that, but for the intervention of Garcia and Gormley, could have resulted in violence.⁹ Allen's profane, threatening, and coercive conduct was not protected by the Act, regardless of other considerations discussed below. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942); *International Woodworkers of America, Local Union 3-3, AFL-CIO (Western Wirebound Box Co.)*, 144 NLRB 912 (1963).

2. The arrest

Garcia and Gormley credibly testified that Allen repeatedly was warned that his conduct was dangerous, both to himself and to others, and that he must correct

his conduct or be subject to arrest, but that Allen ignored the warnings and defied the two officers.

Garcia and Gormley credibly testified that they exercised their discretion as peace officers in not arresting, but only warning, Allen during the afternoon. Garcia credibly testified that an arrest form was signed by several people, including Purdy, prior to Allen's arrest.

Garcia and Gormley credibly testified that Allen's arrest was caused by Allen's belligerent and unprovoked verbal attack on an elderly man who was going into Respondent's store as a customer. The officers stated that, after the unsuccessful warnings given to Allen, his conduct toward the man was the last straw. Gormley graphically described the effect Allen's conduct had on the elderly man, and testified that he had to assist the man, who was visibly shaken, to his car.¹⁰ The man was too shaken to sign an arrest form, but he was willing to sign one. When Gormley returned to where Garcia was standing, he saw that Garcia had a signed arrest form,¹¹ and he and Garcia decided together to make the arrest, because of the incident and because of the danger inherent in permitting Allen to continue his improper behavior. Allen then was arrested and taken into custody. Gormley credibly testified that, because the situation was so volatile, it would have been inadvisable to arrest Allen without a signed arrest form.

3. Alleged causation of the arrest

Paragraph 6 of the complaint alleges that Massey or Purdy, or both, caused Allen's arrest in order to interfere with the protected activity of Respondent's employees. The record does not support that allegation.

Soldate testified that she talked with Massey about someone harassing employees, and Massey replied, "That the policeman was keeping an eye on him." She said she went to see Massey because customers were complaining to her about the harassment.

Garcia denied that Allen was arrested because of Massey's request. He said he was in Massey's office several times during the day, but that he did not discuss with Massey, the fact that Allen was going to be arrested. Garcia reiterated that Allen's abuse of the old man was what triggered Allen's arrest. Garcia said four persons, including Purdy, signed the arrest form and that Purdy signed it 10 or 15 minutes before the arrest.

Gormley testified that neither Massey nor Smith had any influence on the decision he and Garcia made to arrest Allen. Gormley said Massey came by outside during the day to see what was going on, but that he did not talk with Massey at any time about the arrest. Both Garcia and Gormley testified that Allen would not have been arrested if he had heeded their warning to discontinue harassing and threatening people.

Purdy testified that she talked with Garcia while Massey was present, about 2:30 or 2:45 p.m., and said she would sign an arrest form. She said she did not talk with Garcia thereafter.

⁹ Garcia and Gormley credibly testified that, when they were assigned to this special duty, they were advised of the bomb threats and other possible violence, and that they were given the assignment of protecting all persons and property at the scene of the picketing.

¹⁰ Allen testified that he has no recollection of this incident involving an old man and is certain he never would have done such a thing. Allen's denial is not credited.

¹¹ The arrest form was not offered, or introduced, into evidence.

Massey testified that he did not talk with Garcia about arresting Allen. He said he talked with Purdy and Garcia at approximately 2:30 p.m., but only because of Purdy's complaint to him. He said he occasionally went outside to check the situation, but denied that he tried to have Allen arrested.

Discussion

There are a few contradictory statements in the record, and a few discrepancies,¹² but they are of a minor nature and do not affect any finding or conclusion. There is no reasonable basis upon which to conclude that Allen's arrest was suggested, caused by, or influenced in any manner by Massey or Purdy or anyone else connected with Respondent. Garcia and Gormley are credited in their testimony that Allen was arrested because, and only because, of his dangerous and unlawful conduct culminating in harassment of an elderly customer of Respondent, and that they acted on their own. It is apparent, and it is found, that Garcia and Gormley acted only pursuant to their duties as police officers when they arrested Allen. Massey is credited in his denial of any complicity in the arrest of Allen.

Purdy was one of several persons who signed the arrest form, but it is apparent that she signed as an enraged citizen and not as a supervisor of Respondent. She signed the form on the sales floor in an open area. She had been verbally abused by Allen, and it was up to Garcia and Gormley to use the arrest form as they saw fit, in their capacity as police officers. The form was used in the customary manner as support for an arrest, and it is clear that the form did not cause the arrest or contribute thereto.

¹² For instance, Purdy said she last saw Garcia at approximately 2:30 p.m., and Garcia said Purdy signed the arrest form approximately 10 or 15 minutes prior to Allen's arrest.

There is no evidence that Respondent attempted in any manner to interfere with the Union's picketing. To the contrary, Massey credibly testified, without challenge or contradiction, that the picketers were permitted to use Respondent's restrooms, drinking fountain, umbrellas, and private rest areas. Further, Massey credibly testified, again without challenge or contradiction, that picketing continued unabated after Allen's arrest. Finally, only Allen was arrested. No other picketer was arrested or interfered with.

The allegations of the complaint are not supported by the record.¹³

CONCLUSIONS OF LAW

1. Carither's Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not, as alleged, violate Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁴

The complaint is dismissed in its entirety.

¹³ Allen's contention, first made during his rebuttal testimony, that Garcia threatened to arrest him because of a personal quarrel was without support and is given no credence. As pointed out by Respondent, this contention by Allen, even if credited, would make it clear that Respondent was not involved in the arrest; that Garcia made a threat and the arrest because of a personal confrontation with Allen.

¹⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.